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No. 85-500

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD G. CARROLL and JOHN E. BARCLAY,

Petitioners,

vs.

WILLIAM E. ALBERTS and DONALD T. DEVINE,

Respondents.

JOINT MOTION OF THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Pursuant to Rules 36(1) and 42(2)(b) of the Rules of this Court, the General Council on Finance and Administration of the United Methodist Church ("GCFA") and the National Council of the Churches of Christ in the United States of America ("the National Council") respectfully move for leave to file a brief, a copy of which is annexed hereto, as *amici curiae* in support of the Petition for a Writ of Certiorari filed by Petitioners Edward G. Carroll and John E. Barclay.

The respective counsel for Petitioners have consented to filing of the accompanying brief pursuant to letters which are tendered herewith as Appendix Exhibits B and

C. However, the Respondent, Rev. Mr. Alberts, has refused to consent for reasons set forth in letters attached as Appendix Exhibits D and E.

GCFA and the National Council seek to appear as *amici curiae* in the instant proceeding to present additional argument on the following points:

1. The impact on the free exercise of religion by United Methodism, other denominations and the Christian Church, as a whole, if internal church procedures for the selection, evaluation and discipline of clergy are now made subject to intensive civil court review, ostensibly to aid in the resolution of tort litigation brought in a state court by a clergyman against his religious superiors.

2. Whether the ability of plaintiff to secure information to enhance and prove-up his state court suit, pursuant to a new, judicially created cause of action for wrongful disclosure of confidential medical information, is, under *Wisconsin v. Yoder*, 406 U.S. 205, 32 L.Ed.2d 15, 25 (1972), an ". . . interest of the highest order . . . not otherwise served . . ." warranting a judicial examination into the processes of church government and discipline.

The interest of the *amici* in this action arises from their concern for the constitutionally guaranteed freedoms of religious denominations to define and implement their own internal standards for the selection and assignment of their clergy, free from state scrutiny or interference. The instant decision of the Supreme Judicial Court of Massachusetts is not merely insensitive to such freedoms, but would greatly undermine them. Unlike any other reported decision in history dealing with the relations of clergy within a religious society, the Massachusetts Court flatly authorizes the judge and jury hearing Rev. Mr. Alberts' privacy case to inquire into ". . . church processes regard-

ing the appointment and the discharge of ministers . . . ." (395 Mass. 59, 61) This is ostensibly done to enable Alberts to prove causation and establish damages resulting from the Petitioners' claimed breach of their duty relative to receipt of confidential psychiatric information.

These *Amici* do not claim that church officials are totally immune from damage suits for their secular conduct, or that they are free, in the name of religion, to ignore legitimate state law enactments. Those issues need not be reached in this proceeding. Rather, *amici* are concerned with the breadth of the decision below and the particular method chosen by the Court to implement its new tort theory as applied to these petitioners. A properly framed cause of action might indeed pass muster under the First Amendment. But, some other means of implementation must be found which avoids the church/state entanglement which is inherent in this decision.

GCFA, an Illinois corporation not-for-profit, has among its duties and concerns the safeguarding of legal interests of the United Methodist Church, an international Protestant religious denomination with approximately ten million members and 43,000 local churches. This legal responsibility derives from Paragraph 907(4) of the *Book of Discipline* (1984) of the United Methodist Church. The *Book of Discipline* contains the constitution and basic legislation of United Methodism and constitutes the pronouncement of the highest authority or judicatory in the denomination. It is the evolution of over 200 years of church law and usage.

The National Council is the cooperative agency of 30 Protestant and Eastern Orthodox national religious bodies having an aggregate membership of over 40 million in the United States. It seeks to express the concern of those

diverse religious bodies for the correction of the decision of the Supreme Judicial Court of Massachusetts because of the threat it poses to their internal processes of clergy selection and discipline.

The unprecedented attempt here to authorize a civil jury to determine "causation", "state of mind", "reasonableness of belief", "damages", or any other issue by probing into the mechanisms of clergy selection poses a direct threat to religious self-government. The very existence of a church can ultimately turn upon its ability to freely choose those who will preach its values. That choice must be unfettered by governmental oversight or it will become a self-conscious and inhibited one. Heretofore, all secular courts have been sensitively aware of this danger and have upheld this basic constitutional prerogative of religion. The error below must be promptly rectified.

The attached brief will address five sub-issues as follows: (a) the decision below threatens a direct, frontal intrusion into internal church workings—not merely an incidental burden or inconvenience; (b) until now, decisions of this Court and all other courts of record have uniformly insisted on an absolute prohibition against state review of clergy selection processes; (c) even assuming, *arguendo*, that the prohibition is not absolute, and the *Wisconsin v. Yoder* balancing formulation applies, the judicially created tort here in question does not rise to the level of "a state interest of the highest order" justifying an override of fundamental First Amendment freedoms; (d) Respondent Alberts failed to exhaust a variety of intra-church remedies which were available to him, including certain declaratory remedies available in United Methodism's highest court which were not specifically identified in the Petition for Certiorari; and (e) the retroactive effect of the decision below, announcing a new tort twelve

(12) years after the events at issue took place, deprives the Church of an opportunity to react and, possibly, to order its affairs so as to avoid confrontation with the secular authorities.

Respectfully submitted,

WITWER, MORAN, BURLAGE & WITWER

By: (Signed) Samuel W. Witwer Jr.
Samuel W. Witwer, Jr.

Attorneys for the General Council on Finance and Administration of the United Methodist Church and the National Council of the Churches of Christ in the United States of America, moving for leave to file Brief as *amici curiae* in support of the Petition for a Writ of Certiorari

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INTEREST OF *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the foregoing Motion for Leave to File Brief as *Amici Curiae* in Support of Petition for Writ of Certiorari, and will not be reproduced here.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari is adequate and complete, and need not be duplicated at length here. *Amici* wish only to amplify upon the following points:

1. The process for certification and assignment of United Methodist ministers is essentially one of subjective judgment by the Bishop, the District Superintendents and the clergy members of the Annual Conference. In exercising this judgment, these officials must consider not only the character and deportment of the minister, including his or her "physical, mental and emotional health" (Par. 333, Pet. App. at A-53), but also, biblical, doctrinal and theological considerations enumerated in the *Book of Discipline*. (*Id.*) Among the factors to be considered are the minister's willingness to adhere to the doctrine, rules and government of the Church. (Par. 334, Pet. App. at A-54).

2. Prior to turning to the state courts for redress, Rev. Mr. Alberts made no effort to invoke the internal church trial procedures available to him under the *Book of Discipline*, as pointed out in the Petition for Certiorari. These *Amici* point out additionally that Alberts failed to invoke certain other Disciplinary procedures of a declaratory nature. These procedures provide a mechanism for challenging interpretations of church law and provide methods for submission of such questions and internal rulings through channels which can include the Judicial Council, United Methodism's highest judicial tribunal.

Thus, Respondent Alberts was not only free to seek vindication of his position by filing charges calling for a church trial of Petitioners; he also could have asked, during an Annual Conference session, for a declaratory

ruling concerning a Bishop's authority to act as he did under the circumstances at hand. Any decision following a written ruling request by Alberts would have been automatically submitted to the Judicial Council for review. *Book of Discipline* (1972) at Par. 61(3) (Pet. App. at A-49) and Par. 1512. Alternatively, Alberts might have sought a concurrence of one-fifth of the membership of the Annual Conference, so as to authorize an appeal of the question to the Judicial Council. Par. 62(4) (Pet. App. at A-19).

SUMMARY OF ARGUMENT

The decision below elevates a judicially created tort grounded in "public policy" (395 Mass. 59, 67) and Rev. Mr. Alberts' "right" to prove causation and recover damages to a station of high importance while sacrificing time-honored religious liberties of constitutional origin. The Massachusetts Court has, in effect, issued a license to a civil jury to embark upon a fishing expedition, probing "into church processes regarding the appointment and discharge of ministers." (395 Mass. 59, 61) This is inconceivable to these *amici*. It can only mean an assessment of the state of mind of religious officials and a jury determination as to what impelled them to act adversely to Alberts' interests. Ecclesiastical judgments such as these are obviously grounded heavily in doctrinal considerations, religious tenets and traditions.

Until now, an unbroken line of decisions have viewed clergy selection functions such as these as a forbidden territory where civil courts must not venture. That principle is seriously and unnecessarily eroded in the instant case.

It is the unquestioned right of the Massachusetts judiciary to declare the existence of a new tort cause of action, but it must do so in a way which does not interfere with matters at the very core of religious freedom. Should it become impossible to devise a procedure for advancing Rev. Mr. Alberts' case without a searching jury inquiry into religious polity and practice, fidelity to the religion clauses of the First and Fourteenth Amendments demands that Alberts' personal interests must yield, even at the cost of depriving him of money damages and other civil relief.

ARGUMENT

A.

THE STATE INTRUSION THREATENED HERE IS DIRECT AND PERVASIVE, NOT MERELY INCIDENTAL.

In the portion of the opinion below which has startled religious organizations throughout this country, the court has stated its position bluntly:

> ". . . In the circumstances of this case, the religion clauses of the . . . Constitution . . . do not preclude inquiry by the courts of the Commonwealth into church processes regarding the appointment and the discharge of ministers . . . ."

395 Mass. 59, 61.

* * *

> "[Petitioners'] argue that the principle enunciated . . . above precludes judicial inquiry . . . into the process by which the members of the Church voted to retire Alberts. We disagree."

395 Mass. 59, 72.

Language such as this cannot be found in any reported decision of this or any inferior court since the time of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). It is tantamount to an outright grant of permission for jurors to roam through the religious proceedings culminating in Rev. Mr. Alberts' enforced retirement and to determine for themselves why such action was taken. This aspect of the decision must be promptly reversed.

Because the Court below defined its new tort action in terms which depend upon the perpetrator's "state of mind" (395 Mass. 59, 70), the jurors will need to sift through the religious consultative proceedings and probe the thought processes of Bishop Carroll, District Superintendent Barclay, and approximately 300 clergy peers who voted to deprive Alberts of his office. Likewise, since causation is at issue, the jurors will necessarily seek to find out what "really" prompted the religious officials to act. Their mission will be to determine questions such as these: What relative weight was assigned by Alberts' religious superiors to the medical information secured from Dr. Devine? Did it preponderate over the doctrinal, biblical and theological standards of the *Book of Discipline* so as to become the moving cause of Rev. Mr. Alberts' removal? The mere statement of these possibilities should make obvious the lack of civil court jurisdiction over such an undertaking.

The Massachusetts Court seeks to dismiss as insignificant the intrusion into the inner workings of the Church which its "inquiry" will engender. (395 Mass. 59, 75). Under the Court's formulation, state inquiry into Church processes is seemingly unobjectionable so long as it does not rise to the level of positive or continuous governmental intervention. (*Id.*) This plainly overlooks the law as stated by this Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 59 L.Ed.2d 533, 542 (1979). There,

this Court, in declining to extend the jurisdiction of the NLRB to include bargaining by teachers in religious schools, said:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the religion clauses, *but the very process of inquiry* leading to findings and conclusions." (Emphasis added).

Likewise, in a significant new decision of the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists, et al.*, ____ F.2d ____ (4th Cir., No. 84-1319, September 23, 1985 reproduced as Appendix A attached), the court ruled there was no subject matter jurisdiction to entertain a minister's Title VII race/sex discrimination case against the church which refused her a pastoral assignment. The court acknowledged that Title VII is an interest of great importance Nevertheless, it declined jurisdiction. It found that among several factors militating against plaintiff's position was the likelihood that EEOC and court involvement would inevitably result in substantial *inquiry* into religious proceedings:

> "Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process *designed to probe the mind of the Church in the selection of its ministers.*"

(Slip Opinion attached hereto as Appendix A at A-14) (Emphasis added).

These procedures are precisely what is threatened here. The court in *Rayburn* summed up the matter thusly:

> "It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of 'God's Appointed'." (*Id.* at A-13).

* * *

> ". . . We hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected . . . ." (*Id.* at A-15).

Contrary to the Massachusetts Court's analysis, the intrusion threatened here is scarcely incidental or transitory. Rather, it is direct, material and intimidating in its effect.

B.

THE COURTS HERETOFORE HAVE UNIFORMLY UPHELD AN ABSOLUTE PROHIBITION AGAINST STATE INTERFERENCE WITH SELECTION OF CLERGY.

For well over a century, the courts of this country have steadfastly resisted efforts by disaffected clergy and parishioners to involve themselves in the internal ecclesiastical workings and discipline of religious bodies. In *Watson v. Jones, supra* (decided on non-constitutional grounds), this Court made clear that the rule of deference to internal ecclesiastical decisions was not merely a matter of comity but one of basic subject matter jurisdiction. It quoted with approval from an earlier decision, saying:

> " 'This court . . . having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline . . . We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.' "

(13 Wall at 730).

In more recent times, this and other courts have viewed the rule of deference not only in jurisdictional terms but as a constitutional command. And where disputes over the qualification and authority of the clergy have arisen, the courts have *invariably* declined to intervene. Thus, in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 119

(1952), this Court overturned a state effort to intervene in a church struggle over the selection of its hierarchy. The Court observed that religious guarantees extend to

> ". . . the power [of churches] to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine.*" (Emphasis added).

Similarly, in *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 49 L.Ed.2d 151 (1976), this Court reaffirmed the principle, reversing a state supreme court which had overruled as "arbitrary" a religious tribunal's decision to defrock one of its bishops. The Court summarized its holding in clear and unequivocal terms:

> "In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them." (49 L.Ed.2d at 171).

Significantly, this Court, in *Serbian*, observed as follows:

> "Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern . . ." (49 L.Ed.2d at 167).

Many other cases have followed suit. In *Simpson v. Wells-Lemont Corporation, et al.*, 494 F.2d 490 (5th Cir., 1974), the court upheld dismissal, for want of subject matter jurisdiction, of a suit by an expelled United Methodist minister who had sought damages and other relief against his Bishop and denominational officials. The court said:

> "This case involves the fundamental question of who will preach from the pulpit of the church, and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. *The answer to that question must come from the Church.*" (Emphasis added).
>
> * * *
>
> "The interaction between the Church and its pastor is an integral part of Church government." 494 F.2d at 492, 493.

To the same effect, see *Kaufman v. Sheehan*, 707 F.2d 355, 358 (8th Cir., 1983); *Nunn v. Black*, 506 F.Supp. 444, 448 (W.D. Va., 1981); and the closely analogous decision of the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists, supra*, ____ F.2d ____ (4th Cir., No. 84-1319; September 23, 1985).

These cases demonstrate that ecclesiastical proceedings determining the qualification and discipline of clergy persons are at the core of religion and are inviolate. The prohibition is absolute. No exception has ever been made even to serve laudable government objectives and private rights as will next be shown.

C.

EVEN IF A BALANCING TEST UNDER *WISCONSIN v. YODER* IS APPLIED, THE RELIGIOUS INTERESTS HERE AT STAKE MUST PREVAIL.

Even assuming, *arguendo*, that the prohibition discussed above is not absolute and that the *Wisconsin v. Yoder* balancing test for religiously motivated conduct may now be extended to clergy selection, no compelling state interest is implicated here.

In *Wisconsin v. Yoder* (406 U.S. 205, 32 L.Ed.2d 15 (1972)), this Court said:

> "The essence of all that has been said and written on the subject [state regulation of religiously motivated conduct] is that *only those interests of the highest order and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." (Emphasis added). 32 L.Ed.2d at 25.

The question, then, is the relative importance to be assigned to Massachusetts' new privacy tort and to Alberts' efforts to show proximate cause and to recover damages.

First, we note that laudable as the Massachusetts Court's objectives may be in declaring the new tort, the decision rests solely on "public policy" as that court perceives it. (395 Mass. 59, 67) The court's pronouncement lacks any other underpinning, either constitutional or statutory. Weighing against the court's public policy objectives are religious rights of a constitutional dimension. The absence here of a statute evidencing a legislative judgment is significant, for this Court has assigned lesser weight to "common law" in the church/state balancing process than to statutes. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

Second, a striking feature of the decision below is the long period (twelve years) which intervened between Petitioners' assailed actions at issue and the court's decision to declare such actions a tort. This long history is hardly suggestive of an urgent and compelling state interest of the "highest order".

Third, as pointed out in the Statement of the Case, *supra*, the interests of Rev. Mr. Alberts were indeed "otherwise served" by a variety of judicial mechanisms and tribunals that were open to him within United Method-

ism up to its highest court. Respondent chose not to avail himself of these procedures and thereby failed to exhaust remedies which might have obviated the constitutional problem posed by the instant case.

Finally, the best guide for balancing interests in the present case is to consider decisions, to date, in which various private and state interests have been required to yield to the constitutional right of churches to choose their clergy. So important is the latter principle that the following individual causes of action, however meritorious, have failed because of their potential impact upon clergy selection:

—In *Kaufman v. Sheehan*, *supra*, 707 F.2d 355, 358 (8th Cir., 1983), a defrocked Roman Catholic priest was precluded from pursuing his tort claim (fraud)[1] against the Church based on certain alleged "conspiratorial" actions by his superiors who had, among other things, shared psychiatric information pertinent to his emotional condition.

—In *Simpson v. Wells-Lemont Corporation*, *supra*, 494 F.2d 490, 492 (5th Cir., 1974), an expelled United Methodist minister was barred from proceeding against his church under 42 USCA, Section 1981, on a theory of deprivation of his right to make and enforce contracts.

—In *Nunn v. Black*, *supra*, 506 F.Supp. 444, 447-448 (W.D. Va., 1981), expelled parishioners could not press their property and criminal trespass

[1] In *Gonzales v. Archbishop*, 280 U.S. 1, 16, 74 L.Ed. 131 (1929), this Court noted, by way of dictum, that there may be a "fraud" exception warranting "marginal" civil court review of ecclesiastical decisions. However, no life has ever been breathed into the "exception". In *Serbian*, *supra*, 49 L.Ed.2d 164, this Court commented that "no decision of this Court has given concrete content to or applied the 'exception' ". To the knowledge of *Amici*, no other court has done so either.

claims against church officials who acted against them.

—In *NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. 490, 59 L.Ed.2d 533 (1979), teachers in religiously operated schools were denied the right of union organization under NLRB auspices because such action presented a "significant risk" that First Amendment rights of church self-government would be infringed.

—In *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir., 1972), the Court ruled that Congress in enacting Title VII of the Civil Rights Act, did not intend to intervene between a church and its clergy.

—In *Rayburn v. General Conference of Seventh Day Adventists, supra,* ____ F.2d ____ (4th Cir., No. 84-1319, 1985), a rejected pastor's suit against her church for sex and race discrimination under the equal employment opportunity provisions of Title VII was dismissed in deference to the church's overriding right to freely choose its clergy.

When the state and private rights sought to be vindicated in the above listed cases are compared with the judicially created tort relied upon here by Rev. Mr. Alberts, there can be little doubt about the weight to be assigned to his claims for relief. They must be subordinated to the basic First Amendment rights here at stake.

D.

OTHER ALTERNATIVES MUST BE FOUND FOR IMPLEMENTATION OF THE NEW TORT CAUSE OF ACTION.

It is clear that the Massachusetts Court must fashion some means of implementing its new tort which will avoid injury to First Amendment freedoms. The most obvious

way of accomplishing this would be to declare the tort *prospectively* instead of using the harsh *retroactive* application which has been given here. In such instance, the Church would at least have an opportunity to consider its actions and structure its affairs in a manner which would lessen the potential for a collision between church and state. In *Jones v. Wolf*, 443 U.S. 595, 61 L.Ed.2d 775, 786, n.4, this Court *in dictum* recognized that retroactive application of a new legal principle might, in certain circumstances, infringe upon the free exercise of religious rights. It also noted that in a property context, prospective application of a new legal doctrine has the salutory effect of enabling church organizations to react and tailor their affairs in a way which would maximize their ability to protect their properties. (*Id.*) No less an opportunity should be extended to churches in the present case.

Other methods to avoid church/state conflict might be employed. Even if the Massachusetts Court were to conclusively *infer* causation under defined circumstances, that course would be preferable to the fishing license it has granted the Alberts' jury.

But if all else fails, and it proves impossible to structure a procedure to avoid searching inquiry into religious polity and practice, it is submitted that Rev. Mr. Alberts' personal interests must then certainly yield to protect the constitutional values at issue here.

CONCLUSION

For all the reasons stated above, *amici* respectfully urge this Court to grant the Writ of Certiorari and to reverse the decision of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1319

Carole A. Rayburn,

Appellant,

versus

General Conference of Seventh-day Adventists, an unincorporated association;
General Conference Corporation of Seventh-day Adventists, a corporation;
Potomac Conference of Seventh-day Adventists, an unincorporated association;
Potomac Conference Corporation of Seventh-day Adventists, a corporation;
Kenneth J. Mittleider; and
James Londis;

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. (C/A 81-2202).

Argued: March 4, 1985 Decided: September 23, 1985

Before WINTER, Chief Judge, and SPROUSE and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

This case raises significant questions about the application of the civil rights laws to churches. The issue is whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church wih sexual and racial discrimination under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment to defendants on the grounds that the suit was barred by the religion clauses of the First Amendment. Because state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority, we affirm the judgement of the district court.

I

Carole Rayburn is a white female member of the Seventh-day Adventist Church who holds a Master of Divinity degree from Andrews University, the church's theological seminary, and a Ph.D. in psychology from Catholic University. In 1979 she applied to appellee Potomac Conference, an administrative body within the church, for an Associate in Pastoral Care internship. At about the same time, she applied for a vacancy on the pastoral staff of the Sligo Seventh-day Adventist Church, one of the denomination's largest with a congregation of five thousand people at the church's world headquarters in Takoma Park, Maryland.

Rayburn hoped by securing the internship to be assigned to the Sligo Church vacancy. The pastoral staff of Sligo Church consists of the senior pastor and six associate pastors. The position of associate pastor may be held by an ordained minister, a ministerial intern (a male who has received seminary training but has not been ordained), or an associate in pastoral care (a female who has received seminary training but has a different title from her male counterpart because in the Seventh-day Adventist Church women may not stand for ordination).

Both the Sligo vacancy as an associate in pastoral care and the Potomac Conference internship were awarded to another woman. Upon learning of her rejection, Rayburn filed a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, alleging discrimination on the basis of her sex, her association with black persons, her membership in black-oriented religious organizations, and her opposition to practices made unlawful by Title VII. After receiving a right-to-sue letter, she filed the present action against the Potomac Conference and its President, Kenneth Mittleider, the pastor of the Sligo Church, James Londis, and the General Conference of Seventh-day Adventists, the governing body of the church which must formally approve all applications recommended by local bodies such as the Potomac Conference.[1]

Limited discovery focused on the nature of the associateship in pastoral care. Undisputed evidence showed that the Sligo Church position entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo and other churches, and other evangelical, liturgical, and counselling responsibilities. An associate in pastoral care may also receive a "commissioned minister credential" or a "commissioned minister license," although, as stated, she may never be ordained.

Rayburn did submit some evidence to support her claims of sexual and racial discrimination, but the district court for the District of Maryland granted defendants' motions for summary judgment. The court ruled that the General Conference of the church should be dismissed as a defendant because it had no involvement with Rayburn's application. It held further that a Title VII suit was barred in this instance by the religion clauses of the First

[1] The original complaint also named as defendants the General Conference Corporation of Seventh-day Adventists and the Potomac Conference Corporation of Seventh-day Adventists. Both entities were dismissed by consent of the parties prior to the district court's decision.

Amendment. Contending that selection of an associate in pastoral care is not exempt from Title VII, Rayburn brings this appeal.

II

Before addressing the decision of the district court and the response of Rayburn, we must first determine whether Title VII and the First Amendment necessarily collide in this case. The Supreme Court has often noted that "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *International Association of Machinists v. Street*, 367 U.S. 740, 749-50 (1961); *accord, Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Such a construction is especially appropriate when a broader reading of the statute implicates the religion clauses of the First Amendment. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court, discussing the National Labor Relations Board's jurisdiction over lay teachers in parochial schools under the National Labor Relations Act, stated:

> In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

440 U.S. at 501, *quoting McCulloch v. Sociedad Nacional de Marineros de Honduros*, 372 U.S. 10, 21-22 (1963) (further citation omitted).

The application of Title VII to the employment relationship before us would definitely "give rise to serious constitutional questions." *See e.g. Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*,

344 U.S. 94 (1952); *McClure v. Salvation Army*, 460 F.2d 535 (5th Cir.) *cert. denied*, 409 U.S. 896 (1972). Although we would prefer to avoid those questions, we do not believe that such a course is fairly open to us. The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent. Section 702 of Title VII, as amended, 42 U.S.C. § 2000e-1 (1982), provides:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals *of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (emphasis supplied).

The wording of § 702 may fairly be construed to prohibit some forms of state involvement in ecclesiastical decisions of employment. If, for example, a religious institution were to present "convincing evidence" that an employment practice favored members of one faith or denomination over another, "§ 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination." *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980).

While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin, *see EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 282 (5th Cir. 1981); *EEOC v. Mississippi College*, 626 F.2d at 484; *McClure v. Salvation Army*, 460 F.2d at 558.[2] The statutory exemption

[2] Here, of course, one member of the Seventh-day Adventist Church was selected over another of that same faith for reasons appellant allege pertain to race and sex.

applies to one particular reason for employment decision—that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not.

The legislative history reinforces the plain meaning of the statutory text. The original Act passed by the House in 1964 excluded religious employers from coverage altogether, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1964), *reprinted in* 1964 *U.S. Cong. & Admin. News*, 2391, 2402. The final version excluded such employers only with respect to discrimination based on religion, and then only with respect to persons hired to carry out the employer's "religious activities." P.L. 88-352, Title VII, § 702, 78 Stat. 255 (July 2, 1964), *reprinted in* 1964 *U.S. Cong. & Admin. News* 287, 304. In 1972 the statute was amended to delete the word "religious," P.L. 92-261, § 3, 86 Stat. 103 (March 24, 1972), but Congress specifically rejected proposals to broaden further the scope of the exemption. Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972), at 1229-1230, 1258-1260. To the contrary, the analysis pertaining to § 702 states clearly that "Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin." Section-by-Section Analysis of H.R. 1946, the Equal Employment Opportunity Act of 1972, *reprinted in id.* at 1844, 1845.

We cannot impose upon a statute a limiting construction where to do so would strain congressional intent. Given the wording of the statute and the history behind it, we conclude that Title VII, by "the affirmative intention of the Congress, clearly expressed," *Catholic Bishop*, 440 U.S. at 501, applies to the employment decision in this case. We must turn, therefore, to the constitutional questions.

III

The "wall of separation" between church and state, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) has become a "variable barrier." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), as Congress has enacted comprehensive legislation to achieve desirable goals.[3] Tensions have developed between out cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate all forms of discrimination, on the other.[4]

Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience so long as he does not violate the personal rights of others, is fundamental to our system. *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963). This basic freedom is guaranteed not only to individuals but also to churches in their collective capacities, which must have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Ecclesiastical decisions are generally inviolate; "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical policy on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). The right to choose ministers without government restriction underlies the well-being of religious community, *see Kedroff*, 344 U.S. at 116, for perpetuation of a church's existence may

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[3] *See* D. Laycock, Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L. Rev. 1373 (1981), citing as examples the National Labor Relations Act, the Fair Labor Standards Act, the Civil Rights Act of 1964, and the Federal Unemployment Tax Act. *Id.* at 1373.

[4] *See* B. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Columbia L. Rev. 1514 (1979).

depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.[5]

Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights. We next inquire whether "there is a state interest of significant magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *see also Sherbert v. Verner*, 374 U.S. 403 (1963). It would, of course, be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin. There remains, then, for examination the decisive criterion developed by the Court in *Wisconsin v. Yoder* to resolve a free exercise question: a balancing of the burden on free exercise against the "impediment to . . . [the state's] objectives that would flow from recognizing the claimed . . . exemption." 406 U.S. at 205.

Here that balance weighs in favor of free exercise of religion. The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible

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[5] The free exercise rights of an organized church may appear, upon occasion, to infringe upon the religious liberties of individual members. We discern no such litigable conflict here, however, for the Court in *Kedroff* and *Milivojevich* has warned of the dangers of interposing government between church and believer. No member of a church may claim, under the First Amendment, an enforceable right to be considered or accepted by the church hierarchy as a minister. The dissident or dissatisfied must, under *Milivojevich*, generally look elsewhere for resolution of such grievances.

study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of those problems. Never are people more in need of spiritual leadership than when they turn to a pastor for help in dealing with their most difficult moments. Finally, the selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consultation, example, and guidance in their own lives and in the life of the congregation as a corporate body.

Any one of these functions so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems; when all functions are combined, the burden of potential interference becomes extraordinary. This burden is not diminished by the fact that lay church members may on appropriate occasions be called upon to participate in one or more of these activities or to serve in similar capacities in teaching and counseling each other. Lay ministries, even in leadership roles within a congregation, do not compare to the institutional selection for hire of one member with special theological training to lead others.

The fact that an associate in pastoral care can never be an ordained minister in her church is likewise immaterial. The "ministerial exception" to Title VII first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972), does not depend upon ordination but upon the function of the position, *EEOC v. Southwestern Baptist Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). "As a general rule, if the employee's primary duties consist of

teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' " Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Columbia L. Rev. 1514, 1545 (1979). This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church, *see Southwestern Seminary*, 651 F.2d at 283. In the instance before us, the evidence is simply overwhelming that it is.

While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief. Emphasis on the role of an associate in pastoral care rather than the reasons for Rayburn's rejection underscores our constitutional concern for the unfettered right of the church to resolve certain questions. The fact that the Seventh-day Adventist Church does not ordain women, the asserted scriptural basis for that practice, and the influence or lack thereof of this restriction in Rayburn's case do not influence our analysis. In "quintessentially religious" matters, *Milivojevich*, 426 U.S. at 720, the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.

The magnitude of the free exercise burden need not always obscure the magnitude of the state's interest embodied in Title VII. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Supreme Court noted that "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest," but with the caveat from *Wisconsin v. Yoder*, 406 U.S. at 215, that nevertheless "only those in-

terests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." 450 U.S. at 718. As Title VII is an interest of the highest order, courts have held that Title VII properly applied to the secular employment decisions of a religious institution, such as those relating to a secular teacher in a church-approved school, *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), or editorial secretary in a church publishing house, *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982). But courts must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where the "inroad on religious liberty" is too substantial to be permissible. *Thomas v. Review Board*, 450 U.S. at 718. This case is of the latter sort: introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state. While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs. The balance of values thus weighs against Rayburn's suggestion that the government may question the decision of the Seventh-day Adventist Church to hire another candidate as an associate in pastoral care.

IV

To subject church employment decisions of the nature we consider today to Title VII scrutiny would also give rise to "excessive government entanglement" with religious institutions prohibited by the establishment clause of the First Amendment, *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).[6] Under *Lemon*, entanglement is measured

[6] *Lemon* proposes three tests for determining the validity of a statute under the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary

(Footnote continued on following page)

by the "character and purposes" of the institution affected, the nature of the benefit or burden imposed,[7] and the "resulting relationship between the government and the religious authority." 403 U.S. at 615.[8] These criteria require us to decline examination of the Seventh-day Adventist Church's decision here.

Appellant seeks to bring within the purview of Title VII the church itself, the institution with which the danger of entanglement is most sensitive. If the dangers of entanglement were severe with respect to parochial schools,

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[6] *continued*
effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-613 (citations omitted). There is no question that Title VII meets the first two of these tests.

[7] As the statutes under discussion in *Lemon* provided benefits to parochial schools, the Court stated its criteria only in positive terms, whereas here we consider a potential burden on a religious institution. We see no reason why the dangers of entanglement are diminished in the latter situation. The risk of entanglement is not limited to situations where there is state assistance or sponsorship of a religious institution. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 674 (1970) (either taxation or exemption of churches would raise questions of entanglement). The dangers of entanglement are posed where there exists a continuing close administrative relationship in core areas of faith that poses the possibility of secular approval granted or withheld from religious denominations. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. at 502. While the administrative relationship here constitutes a burden on the religion—and hence implicates free exercise values—we think that the First Amendment is also independently concerned that "a comprehensive, discriminating, and continuing state surveillance will . . . involve excessive and enduring entanglement between state and church." *Lemon v. Kurtzman*, 403 U.S. at 619; *Aguilar v. Felton*, 53 U.S.L.W. 5013 (1985).

[8] We recognize that the Court has recently indicated that the *Lemon* test is not necessarily the only appropriate means for deciding an establishment question. *Lynch v. Donnelly*, ___ U.S. ___, 104 S.Ct. 1355, 1362 (1984). Nevertheless, the framework of that case seems well suited to questions which involve the relationship of government to religious institutions.

Aguilar v. Felton, 53 U.S.L.W. 5013 (1985); *Lemon*, *supra*, they are all the more serious with respect to the church itself. While schools may serve both secular and sectarian functions, the purpose of the church is fundamentally spiritual, and the danger of "interaction between church and state," *Lynch v. Donnelly*, ___ U.S. ___, 104 S.Ct. 1355, 1364 (1984), is what the establishment clause protects against.

The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level. On a substantive level, the unrefuted evidence from appellee Potomac Conference emphasized the importance of "spirituality" as an attribute of an associate in pastoral care and stated that in making an appointment, "The guidance of the Holy Spirit is always sought so that the one chosen can be God's appointed, as well as the one who has the support of his/her fellow churchmembers." It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."

Moreover, the goals of a church in the selection of its spiritual leaders and of a governmental agency in the performance of its statutory mandate may not be the same. The Equal Employment Opportunity Commission may or may not share the values of any given church, whose highest priority is simply one of fidelity to its own beliefs and practices. The danger is that choices of clergy which conform to the preferences of public agencies may be favored over those which are neutral or opposed. The church's selection may at times result from preferences wholly impermissible in the secular sphere.[9] Where goals differ, the temptation for state intrusion becomes apparent. But "[e]ven if government policy and church doc-

[9] For example, some churches, like the Seventh-day Adventist, do not permit the ordination of women.

trine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L. Rev. 1373, 1399 (1981). Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission. Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

On a procedural level, entanglement might also result from a protracted legal process pitting church and state as adversaries in disregard of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). "[P]ervasive monitoring by public authorities . . . infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Aguilar v. Felton*, 53 U.S.L.W. at 5016. A Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC, the federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose, 42 U.S.C. §2000e-5(g) (1982), may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions. In *Catholic Bishop*, the Supreme Court, holding that church-operated schools

were not subject to NLRB jurisdiction, noted that "It is not only the conclusions that may be reached by the Board which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502. The same is true here. There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.

Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions. *See, e.g., EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (Title VII could be applied to promotion of secular teacher in religious educational institution); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (Title VII applicable to administrative and support staff at a seminary); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary at church-affiliated publishing house); *Whitney v. Greater New York Corporation of Seventh-day Adventists*, 401 F.Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist). Without adopting or rejecting the specific rulings of such cases, we hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected here.

The decision of the district court is

AFFIRMED.

PEABODY & ARNOLD

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October 3, 1985

Samuel Witwer, Jr., Esq.
125 South Wacker Drive
Chicago, Illinois 60606

Re: Edward Carroll & John Barclay
v. William Alberts & Donald Devine
Supreme Court Docket No. 3624

Dear Mr. Witwer:

By this letter we give consent to the filing by your organization of an amicus curiae brief in connection with our petition for certiorari in the above case.

Very truly yours,

Deborah S. Griffin

Deborah S. Griffin

DSG:nlf

RECEIVED
OCT 7 1985
WITWER, MORAN, BURLAGE & WITWER

APPENDIX B

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17
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1985

Samuel W. Witwer, Jr., Esquire
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Attorneys at Law
Suite 2700
125 South Wacker Drive
Chicago, Illinois 60606

Re: United States Supreme Court
Edward G. Carroll and John E. Barclay, Petitioners
v. William E. Alberts and
Donald E. Devine, Respondents

Dear Mr. Witwer:

In accordance with Rule 36 of the Rule of the United States Supreme Court and on behalf of John E. Barclay, petitioner in the above case, I consent to the filing of a brief or briefs amicus curiae by the General Council on Finance and Administration of the United Methodist Church and by the National Council of the Churches of Christ in the United States of America in the above petiton for writ of certiorari.

Very truly yours,

Florence E. Freeman

FEF/me

APPENDIX C

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October 9, 1985

RECEIVED
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Samuel W. Witwer, Jr.
Witwer, Moran, Burlage & Witwer
125 South Wacker, Suite 2700
Chicago, Illinois 60606

Re: Alberts v. Devine

Dear Mr. Witwer:

I have fully discussed, with Dr. Alberts, your request for my assent to your filing of an amicus brief in the United State Supreme Court. Dr. Alberts has decided that he will not assent to your filing of such an amicus brief and has instructed me to notify you of this decision and forward to you a copy of his letter to me on this point.

I realize that I had initially indicated that our assent would be forthcoming and I regret any inconvenience that this may cause you. However, given the history of this litigation and the history of the treatment of Dr. Alberts by the defendants in this case, I am not surprised in the least that he has chosen to withhold his assent.

Sincerely,

Robert J. Doyle

RJD:lcm

cc: William E. Alberts

APPENDIX D

The COMMUNITY CHURCH of BOSTON

WILLIAM E. ALBERTS, Ph.D.
Minister
REV. DONALD C. LOTHROP
Minister Emeritus

THE COMMUNITY CHURCH CENTER
565 BOYLSTON STREET
BOSTON, MASSACHUSETTS 02116
COMMONWEALTH 6-6710

October 9, 1985

Attorney Robert J. Doyle
9 Hamilton Place 3rd Floor
Boston, MA 02108

Dear Rob:

I am strongly opposed to the General Council on Finance and Administration of The United Methodist Church filing an amicus brief as a friend of the US Supreme Court on behalf of petitioners/ co-defendants Bishop Edward G. Carroll and former District Superintendent John E. Barclay.

In his letter of October 3, 1985, the General Council's attorney, Samuel Witwer, Jr. would have us believe, "We do not represent individual Methodists or officials, but rather, attempt to represent the broader interests of faith in litigation involving legal and constitutional questions." If this were true, the General Council on Finance and Administration and its legal counsel would be opposing Bishop Carroll and Rev. Barclay's appeal to the US Supreme Court instead of seeking to file an amicus brief on their behalf.

Bishop Carroll and Rev. Barclay's appeal to the US Supreme Court is based on an argument that would sacrifice the right of privacy of all United Methodist ministers: that I gave up my right of privacy when I became a United Methodist minister, that in going to my former psychiatrist without my knowledge and permission they were fulfilling "their sacred calling" and exercising "their rights of freedom to engage in religiously motivated conduct authorized under Church law"(co-defendants PETITION to the US Supreme Court, pages 8, 10 and 11), and that their behavior is protected by the 1st and 14th Amendments of the Constitution. If the US Supreme Court decides to hear their appeal and they win, all United Methodist ministers lose their right of privacy-- and possibly other ministers as well.

The General Council on Finance and Administration's filing of an amicus brief would serve the very opposite purpose of any "attempt to represent the broader interests of faith in litigation involving legal and constitutional questions." It would represent injustice in the name of "the faith".

In becoming a friend of the Court in this case, the General Council would become an enemy of its own ministers-- and possibly other clergy as well-- who would lose their right of privacy if Bishop Carroll and Rev. Barclay are successful in their attempt to

APPENDIX E

The COMMUNITY CHURCH of BOSTON

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COMMONWEALTH 6-6710

get the US Supreme Court to bail them out and keep supressed all the evidence of their criminal abuse of their authority.

On behalf of my former United Methodist minister colleagues and all United Methodist ministers-- and other clergy-- I urge the General Council on Finance and Administration of The United Methodist Church to initiate its own internal investigation of the issues surrounding and the roles Bishop Carroll and then Superintendent Barclay played in my forcible removal from the United Methodist ministry. Such an internal investigation would truly serve "the broader interests of the faith." Please forward a copy of this letter to attorney Samuel Witwer, Jr.

Sincerely,

William E. Alberts